

THE HONORABLE RICHARD A. JONES
THE HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

v.

MONSANTO COMPANY, *et al.*,

Defendants.

CASE NO. 2:16-CV-00107-RAJ-MLP

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO EXCLUDE THE
EXPERT TESTIMONY OF LISA
RODENBURG**

Noted for: August 26, 2022

Oral Argument Requested

1 Monsanto challenges the admission of certain opinions from Plaintiff's retained expert, Lisa
 2 A. Rodenburg, Ph.D. ("Rodenburg") who opines that "in most cases, greater than 95% of the total"
 3 PCBs found within the Lower Duwamish Waterway ("LDW") are attributable to Monsanto (known
 4 as "Aroclors") rather than other manufacturers, or PCBs inadvertently generated during hundreds
 5 of manufacturing processes and that are contained within numerous consumer products (known as
 6 "byproduct" PCBs). *See* Defendant's Motion to Exclude Rodenburg, Dkt. 320 at p. 4. Rodenburg
 7 is really two people: one the one hand, she is an academic who has trumpeted the significance and
 8 pervasive, ubiquitous presence of byproduct PCBs for decades; on the other hand, she is a
 9 professional witness who makes a lucrative living saying the exact opposite. *See id.* at 4-5; *see also*
 10 Rodenburg PowerPoint, attached as Ex. A of DeBord Decl. at 10-11, 40; Rodenburg PowerPoint,
 11 attached as Ex. B of DeBord Decl. at 23; Rodenburg Webinar Transcript, attached as Ex. C of
 12 DeBord Decl. at 52:13-53:10.

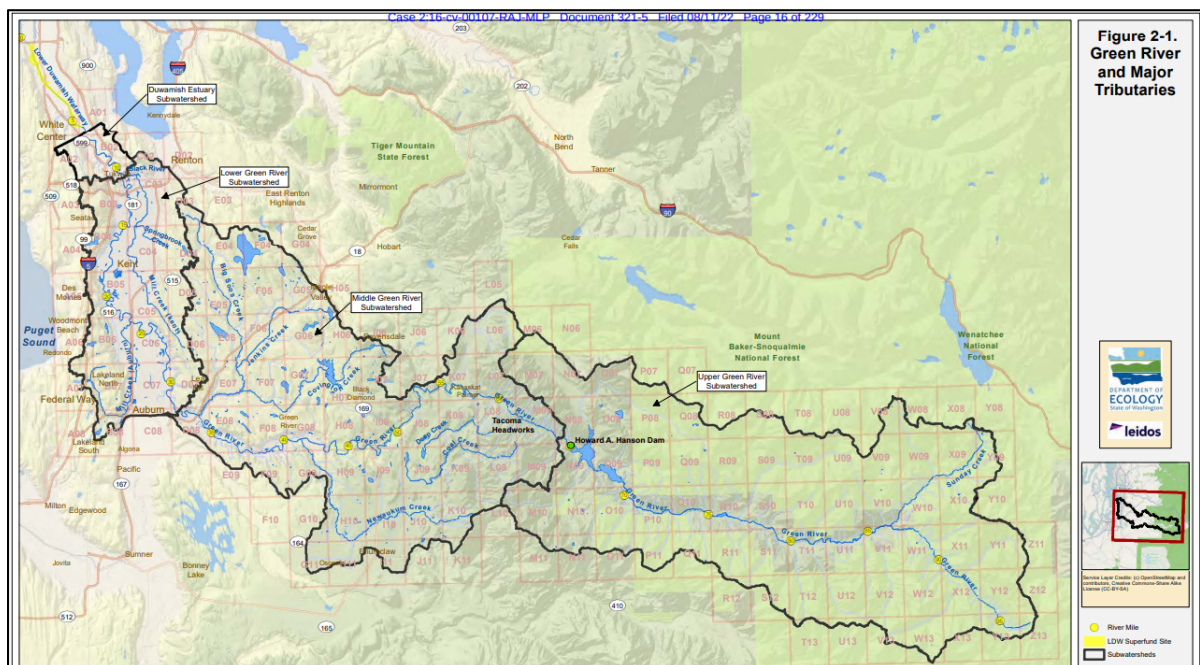
13 While Monsanto does not challenge Rodenburg's qualifications or opinions concerning the
 14 presence and ubiquity of byproduct PCBs within the environment, the fact that the opinions
 15 Rodenburg offers here are diametrically opposed to those which she offers in non-litigation contexts
 16 perhaps explains why Plaintiff has dedicated a significant portion of its Opposition toward the
 17 proposition that Rodenburg's "qualifications are beyond reproach." *See* Plaintiff's Opposition, Dkt.
 18 382 at 5. This position misses its mark entirely, as Plaintiff recognizes "Monsanto does not
 19 challenge Dr. Rodenburg's qualifications[.]" *Id.* at 5. Instead, Monsanto challenges those opinions
 20 which Rodenburg derived from: (1) data obtained from *outside* of the Lower Duwamish Waterway
 21 ("LDW") at issue; (2) through a comparison of sampling data to mixtures of Aroclors while
 22 excluding the full-suite of byproduct sources and congeners contributing to the LDW; and (3) while
 23 using r^2 cutoff values that are scientifically arbitrary and indefensible, and are contradicted by
 24 authoritative literature which Rodenburg cites favorably.

25 **I. Rodenburg Relies on Unrepresentative Data from Outside of the LDW**

26 Plaintiff argues that the data underlying Rodenburg's analyses must be reliable because the
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“majority of the data was collected and vetted in connection with a study by the Washington Department of Ecology” before the commencement of this litigation. Dkt. 382 at 4. This position is belied by publications concerning the Green-Duwamish River Watershed study from which Rodenburg derived such data, which recognize that “no independent investigations concerning the accuracy or completeness of the information relied upon” has been made by the study’s authors. Dkt. 321-5 at 3. Notably, Plaintiff omitted this language from its citation to the Phase 2 report, *compare* Dkt. 383-1 with DeBord. Ex. D at 2, and attempts to downplay its significance by referring to the language as “boilerplate” in nature without any meaningful explanation. Dkt. 382 at 10

Plaintiff’s argument is also illogical. While data generated during the study of the larger Green-Duwamish River Watershed (which extends to river mile 95.0) might be reliable for certain purposes, that data does not automatically become reliable when focusing on the LDW, which is encompassed entirely within river miles 0 to 5.0. Plaintiff attempts to downplay the percentage of data derived from outside the LDW by recognizing that “some of [the data] comes from samples taken outside” of the LDW. Dkt. 382 at 9. As noted in the instant Motion—and uncontested by Plaintiff—up to 96% of the data for certain environmental compartments at issue were taken from *outside* of the LDW. Dkt. 321-1 at 18-19. An image of the Green-Duwamish River Watershed as compared to the LDW at issue is illuminating, and can be found at Dkt. 321-5 at p. 16:



1 The LDW is located in the yellow-highlighted portion in the top-left corner of the map, while the
 2 data for the larger Green-Duamish River Watershed study—on which Rodenburg relies—were
 3 derived largely from the larger black subwatersheds depicted in Figure 2-1.

4 This map also discounts Rodenburg’s attempt to explain-away her failure to use data derived
 5 from within the LDW. As Plaintiff states: “including data from parts of the watershed outside the
 6 LDW is appropriate because ‘the Duwamish [is] a tidal system, and so the water is flowing back
 7 and forth, the sediment moves with the water back and forth’” Dkt. 382 at 9. Yet, when
 8 questioned as to any specific analysis Rodenburg conducted to determine the extent to which these
 9 purported tidal qualities render data *outside* of the LDW relevant to and representative of conditions
 10 *within* the LDW, Rodenburg admitted that: (1) the “tidal” qualities would have no impact on certain
 11 sampling data (*e.g.* atmospheric deposition); (2) she does not know whether the “tidal” qualities
 12 would impact storm drain or stormwater data at issue¹; and (3) she did not discuss or report the
 13 results of any such analysis in her written report for this case. Dkt. 321-2 at 311:7-312:20.

14 Nevertheless, Plaintiff assures the parties and this Court that “Dr. Rodenburg evaluated the
 15 quality of the available data and determined that the data [were] sufficient” for her purposes. Dkt.
 16 382 at 8. This is not the applicable standard for expert testimony, and this Court “need not admit
 17 an expert opinion that is connected to the underlying data ‘only by the ipse dixit of the expert.’”
 18 *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1153 (E.D. Wash. 2009) (quoting *General*
 19 *Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). At the very least, Rodenburg’s opinions should be
 20 confined to those concerning data obtained from *within* the LDW at issue.

21 **II. Rodenburg’s Methodology Arbitrarily Excludes Byproduct PCB Mass**

22 Plaintiff does not take issue with Monsanto’s description of Rodenburg’s Positive Matrix
 23 Factorization (“PMF”) and Multiple Linear Regression (“MLR”) analyses—but instead, argues that
 24 Monsanto’s criticisms of Rodenburg “for excluding certain data is misplaced” because data
 25 exclusion “is required by the analysis” that Rodenburg employed. Dkt. 382 at 11. Simply because

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 27 ¹ A “tidal” system would have no logical impact on otter scat or organism tissue, so that 5 of the 7 total
 28 environmental compartments Rodenburg considered would not be impacted by her purported “tidal” rationale.

1 the exclusion of data is *required* by the analyses Rodenburg employed does not render her
2 methodology or the opinions generated from it reliable.

3 For example, despite the fact that 130 of the 209 possible PCB congeners have been
4 associated with byproduct sources, Dkt. 321-2 at 229:5-9, Plaintiff asserts that “it is not possible to
5 determine whether the source of excluded PCB mass was [Aroclor] or byproduct” in nature because
6 “most of the PCB congeners that have been identified as potentially associated with byproduct
7 PCBs are also contained in Monsanto’s Aroclors.” Dkt. 382 at 11. In anticipation of this argument,
8 Monsanto focused its inquiry on PCB 11, which according to Rodenburg, is “virtually absent in
9 Monsanto’s Aroclors.” Dkt. 321-1 at 14. Plaintiff does not dispute the fact that Rodenburg’s
10 analysis resulted in the exclusion of more than 78% byproduct PCB 11 from certain sampling data.
11 Dkt. 321-2 at 193:21-194:3. This arbitrary exclusion of data results in an undercounting of
12 byproduct PCB contributions to the LDW, and renders Rodenburg’s opinions unreliable. *Abarca*
13 *v. Franklin Cty. Water Dist.*, 761 F. Supp. 2d 1007, 1066 at FN60 (E.D. Cal. 2011) (“[A] reliable
14 expert would not ignore contrary data, misstate the findings of others, [or] make sweeping
15 statements without support[.]”)

16 In an attempt to downplay the presence and ubiquity of byproduct PCB sources within the
17 environment, Plaintiff asserts that byproduct sources “have been found in vanishingly few
18 locations” and are “a significant source of PCBs to the environment in a very small number of
19 cases.” Dkt. 382 at 12. While this claim is in direct contradiction to opinions which Rodenburg
20 offers outside of litigation, it should be again noted that Monsanto does not challenge Rodenburg’s
21 qualifications or opinions concerning the presence and ubiquity of byproduct PCBs within the
22 environment, which Rodenburg has described as the “main problem” facing municipalities like the
23 City of Seattle. Dkt. 320 at p. 4; *see also* Rodenburg PowerPoint, Ex. A at 40 (“Non-Aroclor
24 sources are showing up everywhere (more than just PCB 11)”); Rodenburg Presentation, Ex. C at
25 52:13-53:10 (“[T]hey can go after Aroclor-type sources . . . But that’s not their main problem.
26 Their main problem is PCB-11 [from] pigments.”).

1 Additionally, in an attempt to overcome the fact that Aroclor 1016 cannot account for the
2 presence of approximately 30% of the PCB mass within the “Air1” and 50% of the PCB mass
3 within “Sediment 1”, Plaintiff posits that these compartments were discussed in reports that were
4 “approved by the Washington Department of Ecology” and therefore, Rodenburg’s attribution of
5 100% of each of these environmental compartments to an Aroclor source must be the product of a
6 reliable methodology. Dkt. 382 at 14-15. Should Plaintiff prevail along this line of reasoning, this
7 Court’s authority in ruling on pretrial issues including the admission of expert testimony would be
8 delegated entirely to a state regulatory agency. This absurd result must be avoided. Simply because
9 the data within “Air1” was discussed in a report submitted to the Washington Department of
10 Ecology does not render Rodenburg’s opinions reliable or admissible at trial.

11 Next, Plaintiff glosses over Monsanto’s critique that Rodenburg failed to consider whether
12 sampling data is comprised of a mixture of Aroclor and byproduct PCB sources. In response to this
13 criticism, Plaintiff simply states: “Dr. Rodenburg also compares the fingerprints to non-Monsanto
14 PCBs” and offers a characterization that: “[j]ust as she does with Monsanto’s PCBs, Dr. Rodenburg
15 calculates an r^2 value comparing each fingerprint to non-Monsanto PCBs” Dkt. 382 at 13.
16 Plaintiff’s position is misleading. As noted in the instant Motion—and uncontested by Plaintiff—
17 Rodenburg compared PMF sampling data to: (A) Aroclors or mixtures of Aroclors; and separately,
18 to (B) byproduct PCBs from either silicon or pigments (but never a mixture of the two). Dkt. 321-
19 2 at 223:10-15. These comparisons exclude the possibility that environmental sampling data is
20 comprised of both Aroclor *and* byproduct PCBs. By failing to consider whether sampling data is
21 comprised of a *mixture* of Aroclor and byproduct PCB sources, Rodenburg’s methodology excludes
22 up to 50% of PCB mass within sampling data—including byproduct PCB congeners—that
23 Rodenburg then attributes solely to an Aroclor source. *Id.* at 243:16-244:13.

24 Plaintiff also fails to address Monsanto’s critique that Rodenburg further understates
25 byproduct PCB contributions to the LDW by considering only 4 congeners (PCBs 11, 206, 208 and
26 209) and two sources (silicon and pigment) of byproduct PCBs, despite admitting that more than
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1 130 individual congeners contained within hundreds of consumer products have been identified as
2 byproduct in nature. Dkt. 320 at 11. Even Rodenburg admits that, by considering only 4 out of
3 130 potential byproduct congeners, her methodology could result in an “underestimation of
4 byproduct sources” within the LDW. Dkt. 321-2 at 264:15-265:4. Plaintiff attempts to overcome
5 these glaring deficiencies by shifting the burden to Monsanto, stating: “Monsanto offers no
6 evidence that PCBs from all of these products ever have been found in the environment.” Dkt. 382
7 at 15. Yet, during her deposition, Rodenburg admitted that she failed to consider byproduct
8 sources—such as asphalt—that were “certainly” used throughout the LDW. Dkt. 321-2 at 251:16-
9 253:15. At the very least, Rodenburg’s opinions should be limited to those based on a comparison
10 of sampling data to a mixture of Aroclor and *all* relevant byproduct PCB sources and congeners
11 found within the LDW.

12 **III. Rodenburg’s Methodology Utilizes Arbitrary r^2 Cutoff Values**

13 Finally, in discussing Rodenburg’s interpretation of r^2 cutoff values, Plaintiff asserts that
14 “Rodenburg used the same interpretation in a peer-reviewed paper published in 2020.” Dkt. 382 at
15 15. Yet, the publication to which Plaintiff cites merely refers back to Rodenburg’s use of the same
16 arbitrary cutoff values during the Green-Duwamish River Watershed study from which Rodenburg
17 obtained the data underlying her opinions in this case. Dkt. 383-3 at 3. Even if the Court does
18 consider this circuitous reference to constitute “peer-review”—which it should not—Plaintiff
19 wholly fails to address two alternative bases raised in the instant Motion demonstrating the
20 unreliable nature of Rodenburg’s r^2 interpretation: (1) Rodenburg admits she cannot prove or
21 disprove the use of cutoff values different than her own; and (2) the cutoff values Rodenburg
22 employed are contradicted by authoritative literature which Rodenburg cites favorably. Dkt. 321-
23 3 at 135:12-136:2, 138:18-139:16, 140:2-142:2. At the very least, Rodenburg’s opinions should be
24 confined to those generated using r^2 cutoff values that have been subjected to peer review or are
25 otherwise generally accepted within the scientific community.

26 For the foregoing reasons, Rodenburg’s opinions should be excluded or limited at trial.
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1 DATED: August 26, 2022

2 **SHOOK, HARDY & BACON L.L.P.**

3 By: /s/ Lisa N. DeBord

4 Adam E. Miller (Admitted *Pro Hac Vice*)
5 Lisa N. DeBord (Admitted *Pro Hac Vice*)
6 Susan L. Werstak (Admitted *Pro Hac Vice*)
7 Michael W. Cromwell (Admitted *Pro Hac Vice*)
8 Rachel R. Berland (Admitted *Pro Hac Vice*)
9 190 Carondelet Plaza, Suite 1350
10 St. Louis, (Clayton), MO 63105
11 Phone: (314) 690-020
12 Email: amiller@shb.com
13 ldebord@shb.com
14 swerstak@shb.com
15 rberland@shb.com

16 **LATHAM & WATKINS LLP**

17 Robert M. Howard, CSBA No. 145870
18 (Admitted *Pro Hac Vice*)
19 Jason M. Ohta, CSBA No. 211107
20 (Admitted *Pro Hac Vice*)
21 Daniel P. Brunton, CSBA No. 218615
22 (Admitted *Pro Hac Vice*)
23 Shannon K. Lankenau, CSBA No. 294263
24 (Admitted *Pro Hac Vice*)
25 Natalie C. Rogers, CSBA No. 301254
26 (Admitted *Pro Hac Vice*)
27 12670 High Bluff Drive
28 San Diego, California 92130
Phone: (858) 523-5400
Email: robert.howard@lw.com
jason.ohta@lw.com
daniel.brunton@lw.com
shannon.lankenau@lw.com
natalie.rogers@lw.com

29 **SCHWABE WILLIAMSON & WYATT**

30 Jennifer L. Campbell, WSBA No. 31703
31 Connie Sue M. Martin, WSBA No. 26525
32 David F. Stearns, WSBA No. 45357
33 1420 5th Avenue, Suite 3400
34 Seattle, WA 98101
35 Phone: (206) 622-1711
36 Email: jcampbell@schwabe.com
37 csmartin@schwabe.com

KING & SPALDING LLP

Donald F. Zimmer (Admitted *Pro Hac Vice*)
Megan Nishikawa (Admitted *Pro Hac Vice*)
Troy D. McMahan (Admitted *Pro Hac Vice*)
Nicholas D. Kayhan (Admitted *Pro Hac Vice*)
101 Second Street, Suite 2300
San Francisco, CA 94105
Phone: (415) 318-1200
Email: fzimmer@kslaw.com
mnishikawa@kslaw.com
tmcmahana@kslaw.com
nkayhana@kslaw.com

KING & SPALDING LLP

Peter Hsiao (Admitted *Pro Hac Vice*)
663 West Fifth Street, Ste. 1600
Los Angeles, CA 90071
Phone: (213) 443-4310
Email: phsiao@kslaw.com

SHOOK HARDY & BACON L.L.P.

Richard Campbell (Admitted *Pro Hac Vice*)
Stephen I. Hansen (Admitted *Pro Hac Vice*)
Brandon Arber (Admitted *Pro Hac Vice*)
One Federal Street, Suite 2540
Boston, MA 02110
Phone: (617) 531-1441
Email: rcampbell@shb.com
shansen@shb.com
barber@shb.com

SHOOK HARDY & BACON L.L.P.

Thomas M. Goutman (Admitted *Pro Hac Vice*)
David S. Haase (Admitted *Pro Hac Vice*)
Kim Kocker (Admitted *Pro Hac Vice*)
2001 Market Street, Suite 3000
Philadelphia, PA 19103
Phone: (215) 575-3136
Email: tgoutman@shb.com
dhaase@shb.com
kkocher@shb.com

*Attorneys for Defendants Monsanto Company,
Solutia Inc., and Pharmacia LLC*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I hereby certify that on August 26, 2022, I electronically served the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE THE EXPERT TESTIMONY OF LISA RODENBURG** with the Clerk of the Court using the CM/ECF system, which will send notification to all parties who have appeared in this case.